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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-560

BLYTH, EASTMAN DILLON & CO., INC.,
and MICHAEL STOTT,

Petitioners,

v.

DAVID E. ROLF,

Respondent,

and

AKIYOSHI YAMADA,

Defendant.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent's brief does not controvert or even discuss the essential and controlling grounds upon which petitioners seek this Court's review of this case, particularly that there is a conflict on the law of aiding and abetting among the Circuit Courts and a contradiction in the law pronounced within the Second Circuit. Indeed the only aiding and abetting case cited or discussed in respondent's brief is a

single passing reference to this Court's decision in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

Rather, respondent's opposition to the instant petition for a writ of certiorari is essentially premised on his assertions that:

1. This case presents a controversy in which the defendant Stott was a "primary violator" of the Federal securities laws and *not* a defendant held accountable solely as an aider and abettor;

2. Petitioners did not raise below the issue of whether there can be vicarious liability for aiding and abetting; and

3. The decision below ought not be reviewed because it is not a final judgment assessing damages.*

We propose to discuss these three points which constitute the basis for respondent's opposition to the issuance of a writ of certiorari and to demonstrate as to each that it is wholly lacking in merit. In addition, we shall briefly highlight certain factual items of which this Court should be aware so that this case is perceived in a proper context.

* As stated in the petition, we do not in this application seek a writ of certiorari to review the ruling of the Second Circuit on the issue of damages (Petition, p. 2).

POINT I

There is no merit to respondent's contention that this case presents a controversy in which the defendant Stott was a principal wrongdoer engaged in an independent and primary violation of the law and not a controversy in which that defendant was held accountable solely on the secondary vicarious liability of an aider and abettor.

Respondent asserts that "in this case Stott's dual role as principal *and* secondary violator makes this an inappropriate one for the intial determination of the aider and abettor issue." (Respondent's Brief in Opposition, dated October 3, 1978, p. 13; emphasis added).

The simple fact is that both trial and appellate courts found Stott liable *solely* on the ground of aiding and abetting.

The opinion of the Second Circuit Court said:

> "In the court below, Judge Pierce imposed aiding and abetting liability on defendant Michael Stott . . . . We agree with Judge Pierce on the aiding and abetting liability of Stott." (570 F.2d at 41; A* 2).

The Second Circuit elsewhere said: "We therefore affirm the trial court's judgment to the extent that it found Stott an aider and abettor of Yamada's fraud." (570 F.2d at 48; A 18).

Neither of the courts below found that the defendants were liable otherwise than as aiders and abettors.

* "A" refers to the Appendix to the petition dated October 2, 1978.

Neither of the courts below found that either of the petitioners engaged in a principal primary violation of the Federal securities laws.

Other courts* citing the decision of the Second Circuit Court of Appeals have universally recognized it as an aiding and abetting case. One of the more recent decisions, referring to the holding of the Second Circuit, said of it that it is:

> "a case which seems to have pushed 10b-5 aiding and abetting liability to its outer limits", *Cumis Insurance Society, Inc.* v. *E. F. Hutton & Co.*, Fed.Sec.L.Rep. (CCH) ¶96,576 (S.D.N.Y. 1978), 94,432 n. 10.

POINT II

There is no merit to the assertion made by the respondent that this Court should not hear this case because petitioners did not raise below the issue of whether there can be any vicarious liability for aiding and abetting an independent primary violation by a third party.

In their brief filed in the Second Circuit, the petitioners stated:

> "To crystallize the issues presented for review, we consider first the Trial Court's legal determination that Stott and hence BEDCO are liable to Rolf as aiders and abettors (Opinion, pp. 51-57; JA 67-73). Since we accept it as decided in *this* Circuit that 10(b) liability can be found to exist by one who merely aids and abets, we do not here and now argue that implied civil liabilities for aiding and abetting is appropriate or warranted under the statute (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 192, n. 7)." Brief for Defendants-Appellees-Cross-Appellants at 35, *Rolf* v. *Blyth, Eastman Dillon & Co.*, 570 F.2d 38.

* At the time this brief is being submitted, we could locate 27 separate reported cases in which the decision of the lower court or the trial court was cited.

Plainly our reference to the *Hochfelder* footnote was made in recognition of this Court's declaration in that footnote that:

> "We need not consider whether civil liability for aiding and abetting is appropriate under the section and the rule, nor the elements necessary to establish such a cause of action." 425 U.S. at 192, n. 7.

The court below, in its opinion in the instant case, validated the petitioners' acknowledgment that the Second Circuit in earlier cases established the law in the Second Circuit and allowed imposition of aiding and abetting liability, when it said:

> "Although the Supreme Court has, therefore, not passed on the issue, our court has adopted the position that §10(b) and Rule 10b-5 do permit the imposition of aiding and abetting liability" 570 F.2d at 44; A 9 (Citations omitted).

It is clear in this record that the issue of aiding and abetting was not only raised and resolved in the court below but the legal issue of what constitutes the elements constituting such a course of action was dealt with at length by court and counsel.

POINT III

There is no merit to respondent's contention that the decision below ought not be reviewed because it is not a final judgment assessing damages.

It is true that in seeking *certiorari* review of a state court proceeding, there is a jurisdictional requirement that there be a final judgment for jurisdiction to be conferred upon this Court (28 U.S.C. §1257). There is no such requirement where this Court is exercising its *certiorari* jurisdiction over Federal Courts of Appeal (R. Stern & E. Gressman, *Supreme Court Practice*, ¶2.1, at 52; ¶4.19 at 300 (5th Ed. 1978); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945); 28 U.S.C. §1254).

We submit that our petition has shown that this Court should review the ruling of the Circuit Court below because the ruling of the Circuit Court presents an important and clear-cut issue of law as to which there is a conflict among the Circuit Courts; such a review is fundamental to the further conduct of the case; and if the petitioners' position were sustained, further proceedings would not be required.

The respondent also suggests that this Court ought not hear this case because the Circuit Court left open for determination on another day the "thorny" question as to whether there is liability on an implied private cause of action for a violation of the rules of a national securities exchange or a registered securities association (570 F.2d 38, 43 n. 6, 48 n. 19; A 7, 19).

We fail to understand the suggestion of respondent that because the lower court abstained from the adjudication

of that issue that this Court ought not hear this case to review the issues which the lower court did adjudicate. We submit that the initial question is whether this Court should issue a writ to review the correctness of the actual rulings made by the Second Circuit. As to the other matters, this Court has elsewhere ruled:

> "it is open to us to deal only with the matter considered by the Circuit Court of Appeals and to remand the cases to it for any needed action upon other questions, or to proceed ourselves to a complete decision." *Cole* v. *Ralph*, 252 U.S. 286, 290 (1920).

POINT IV

Certain factual presentations made in respondent's brief do not adequately portray the controlling findings.

Our petition sought to define the important issues of law presented by the decision of the Second Circuit and to explain why it is important that this Court should hear them.

Respondent's concentration on a factual presentation which we consider to be selective and inadequate, compels us to note briefly certain factual elements which are necessarily described in order to keep the legal issues in this case in their proper context.

The trial court expressly found that Rolf was a sophisticated investor (A 48) who wished to take "substantial risks" (A 52), "wanted a very aggressive investment program" (A 50-51), and "was willing to engage in extensive trading" (A 51). The trial court found substantial evi-

dence that Rolf "kept careful watch over his securities" (A 48), checking the prices of his securities several times a week and employing a bookkeeper to keep track of his investments (A 48). The trial court concluded that plaintiff-respondent:

> "... was willing to take the risks involved in short-term trading. . . . Plaintiff's twice-stated investment intent was to double his equity. . . . In brief . . . Dr. Rolf was a trader, not an investor. . . ." (A 80).

Judge Mansfield, in his dissent, reached an identical conclusion:

> "Dr. Rolf was no novice or 'babe in the woods' in the investment field. He had had 19 years of experience, including 10 years completely on his own, during which he was his own adviser and the supervisor of various trading accounts maintained by him with several different Cleveland brokers. . . .
>
> "The picture that emerges from these and other statements made by Rolf is one of a sophisticated investor in securities who was well aware of the difference between gilt-edge, relatively safe securities, on the one hand, and speculative 'high fliers' on the other, and who had determined to get richer quick by choosing an aggressive program involving high-risk, OTC stocks in the hope that his adviser would succeed in picking a few big winners, but well aware of the pitfalls that were involved. . . .
>
> "Rolf's correspondence discloses that he could hardly be classified as a naive, trusting person of limited intelligence looking for safe investments designed to yield substantial income and security. . . . In short, he *wanted* to gamble on some 'high fliers' and for this he looked to Yamada, not Stott." 570 F.2d at 52-53 (footnotes omitted); A 29-31.

Conclusion

For all the reasons set forth above, as well as in the petition, a Writ of Certiorari should be granted to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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